

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

DANIEL PENA,

Plaintiff,

- against -

THE CITY OF YONKERS, et al.,

Defendants.

13 Civ. 1958 (CS)(PED)

**REPORT AND
RECOMMENDATION**

**TO: THE HONORABLE CATHY SEIBEL
UNITED STATES DISTRICT JUDGE**

On March 21, 2013, Plaintiff – then confined at the Westchester County Jail – filed a complaint alleging civil rights violations arising from his arrest, on February 19, 2013, by Yonkers police officers. (Dkt. 2) On May 21, 2013, your Honor issued an Order of Service in this case. (Dkt. 7) Among other things, the Order of Service directed the Clerk of Court to furnish Plaintiff U.S. Marshals Service Process Receipt and Return forms (“USM-285 form”), and instructed Plaintiff that, within 30 days, he must either complete and return the USM-285 forms – if he wanted the Marshals to effect service – or else notify the court that he wished to accomplish service by other means and request that a summons be issued to him directly. The Order of Service advised Plaintiff that he must effect service within 120 days, and cautioned him that if he neither made service nor requested an extension of time in which to do so the Court could dismiss the action for failure to prosecute.¹ The docket reflects that a Service Package including USM-285 forms and other information was mailed to Plaintiff at his address of record on or about May 22, 2013.

¹The Order of Service also warned Plaintiff that he must “promptly submit a written notification to the Court if [his] address changes[.]”

There is no indication that Plaintiff returned the USM-285 forms, nor does the docket reflect that Plaintiff requested a summons or otherwise responded to the Order of Service.

Accordingly, on October 8, 2013, I entered an Order advising Plaintiff of the terms of Rule 4(m) of the Federal Rules of Civil Procedure.² (Dkt.11) The October 8 Order concluded as follows:

Plaintiff is directed to serve the summons and complaint on the defendant on or before **November 8, 2013**. If Plaintiff does not show that service has been made, or show cause, in writing, why service has not been made, by **November 8, 2013**, I will recommend that this action be dismissed pursuant to Rules 4 and 41 of the Federal Rules of Civil Procedure.

Despite this warning, Plaintiff has not submitted proof of service, nor has he provided any explanation for his failure to do so.³

I therefore respectfully recommend that your Honor dismiss this action without prejudice. See Rule 4(m), Fed. R. Civ. P.

Dated: November 12, 2013
White Plains, New York



Paul E. Davison
United States Magistrate Judge

²On July 18, 2013, this case was referred to me for General Pretrial Supervision as well as any Dispositive Motions. (Dkt. 9)

³The docket reflects that on October 23, 2013, the October 8 Order, which had been mailed to Plaintiff at the Westchester County Jail, was returned with the notation "Attempted - Not Known, Unable to Forward." I note that Plaintiff's failure to timely notify the court of a change of address would support dismissal for failure to prosecute under Rule 41(b), Fed R. Civ. P.

NOTICE

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days, plus an additional three (3) days, or a total of seventeen (17) days, from service of this Report and Recommendation to serve and file written objections. See also Fed. R. Civ. P. 6(a), (b), (d). Such objections, if any, along with any responses to the objections, shall be filed with the Clerk of the Court with extra copies delivered to the chambers of the Honorable Cathy Seibel, at the Honorable Charles L. Brieant, Jr. Federal Building and United States Courthouse, 300 Quarropas Street, White Plains, New York 10601 and to the chambers of the undersigned at the same address.

Failure to file timely objections to this Report and Recommendation will preclude later appellate review of any order of judgment that will be entered.

Requests for extensions of time to file objections must be made to Judge Seibel.

A copy of the foregoing Report and Recommendation has been mailed to:

Daniel Pena
223564
Westchester County Jail
Valhalla, New York 10595